IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 114 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI Sd/-
and
HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHUPENDRA SOLANKI

Versus

MUNICIPAL CORPORATION OF THE CITY OF SURAT

Appearance:

1. Special Civil Application No. 114 of 2001

MR RR MARSHALL for Petitioner No. 1

..... for Respondent No. 1-2,3/A,3/C-3/D

MR KAMAL TRIVEDI,FOR M/S TRIVEDI & GUPTA

for Respondent No. 3

MR DEVANG NANAVATI FOR NANAVATI & NANAVATI

for Respondent No. 3/B

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 10/12/2003

CAV. JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA FOR THE COURT)

1 This petition has been preferred seeking direction to quash and set aside the resolution dated 19/12/2000 passed by the Standing Committee of the Surat Municipal Corporation (Corporation) and directing the Corporation to forfeit the amount received from respondent No.3 and also take back possession of land bearing final plot no.143 paiki & 144 of Town Planning Scheme No.8 of Umarvada, Surat (hereinafter referred to as 'the land in question'). The petitioner is a Municipal Corporator and also a Member of the Standing Committee of the Corporation. The case of the petitioner is that the petition has been filed in public interest to prevent abuse of power by the Standing Committee of the Corporation and to ensure that the public monies belonging to the citizens of Surat are not gifted away in violation of law and in breach of the contract entered into by the Corporation with respondent No.3.

2 On 16/1/1999 the Standing Committee of the Corporation considered a proposal that as out of the land in question which was admeasuring 36,500 sq.mtrs.approximately 18,500 sq.mtrs. was occupied by various transport godowns and the remaining land was encroached by hutments of slum dwellers and lepers, the land in question should be allotted to a private developer after charging premium for such development permission. As the said proposal was accepted, on 25/3/1999 a tender notice came to be issued. In response thereto only four applications were received out of which only two applicants deposited earnest money of Rs.41 crores. Out of the two applicant tenderers, respondent no.3 quoted the highest bid of Rs.1,71,00,25,000/-. The said bid was subsequently suo motu revised upward to Rs.1,82,86,50,300/-. On 17/6/1999 vide resolution no. 926/99, the Standing Committee of the Corporation resolved to give 36,5000 sq.mtrs. of land Rs.50,100/per sq.metre to respondent No.3 for development. Accordingly, an agreement (Annexure "A") came to be executed between the corporation and respondent No.3. As per terms of the agreement respondent No.3 paid an amount of 25% at the time of execution of the contract i.e. Rs.45,71,62,500/-.

3 It is the case of the petitioner that as per the terms of the agreement the respondent No.3 was required

to make payment of the remaining premium amount and only thereafter the respondent No.3 could be put in possession of the land in question for the purpose of development. However, instead of doing so the Corporation had put the respondent No.3 in possession of the land in question and also granted instalments to the respondent No.3. That as per the terms of the contract the Corporation was entitled to forfeit the sum of Rs.127 crores (actually should be Rs.111/- crores and odd) and also resume the possession of the land in question. That, even while granting instalments to the respondent No.3 for making payment of remaining amount of premium, the Corporation had asked the respondent No.3 - developer to pay interest @ 14% instead of 18%, i.e. the rate at which the Corporation was charging the residents of Surat in case of late payment of taxes. And lastly, it was urged that though the default had been committed by the respondent No.3 on 30.10.2000, the Corporation had agreed to charge interest only from 16/12/2000. Thus, according to the petitioner, the aforesaid actions of the Corporation would go to show that public interest had been sacrificed and the modified contract was without authority, and was tainted with malafides.

4 A preliminary objection was raised on behalf of the respondents that the contract had been acted upon by the parties and hence, at this stage, the reliefs sought by the petitioner could not be granted. To this, the learned Advocate for the petitioner responded by submitting that the respondent No.3 could be directed to suitably compensate the Corporation as also pay the differential rate of interest. It was submitted that as per clauses 7(iii), 7(iv) & 7(v) of the original agreement (Annexure 'A') the Corporation had acted contrary to public interest eventhough the Corporation was entitled to forfeit the amount of premium paid as also not grant permission to enter land in question until the full payment of premium. In support of the contentions raised, it was submitted that the Municipal Commissioner had already issued a notice dated 27.10.2000/13.11.2000 (Annexure 'B') seeking to forfeit the amount of premium already paid and resume the land in question. That, instead of acting in furtherance of the said notice, the Standing Committee of the Corporation had passed a resolution on 19.12.2000 (Annexure 'C') permitting variations in terms of the contract to the detriment of the Corporation and favouring respondent No.3. It was therefore strenuously urged that the act of issuing the aforesaid notice and the subsequent change in the stand by passing the impugned resolution dated 19.12.2000 would go to show that the action of the

Standing Committee of the Corporation was not above board.

5 The learned Senior Counsel appearing on behalf of the respondent No.1 Corporation submitted that the entire petition was misconceived and based on incomplete facts. Attention was invited to the affidavit-in-reply filed on behalf of the Corporation to submit that the entire process of floating and acceptance of the tender had been challenged by way of various petitions before this Hon'ble Court and the matter had travelled upto the Supreme Court. That, in all the petitions the action of the Corporation had been upheld by the Courts. It was further submitted that the Corporation was obliged to modify the terms of the original contract in light of various litigations which ensued. That, as per the term of the original contract the Corporation was required to hand over vacant possession of the land in question within a period of two months from the date of handing over the possession of the alternate godown constructed by respondent No.3 as specified in clause II.C. of the tender agreement. That, despite respondent No.3 having handed over completed godowns at the alternate site viz. village Magob on 15/4/2000 the Corporation was not in a position to hand over vacant possession of the land in question for the purpose of development to respondent No.3 because of various encroachments including two private temples. That on the one hand the respondent No.3 had already made payment of a sum of Rs.111/- crores and odd and had fulfilled its part of the contract of constructing the godowns at the alternate site, the respondent No.3 could not commence development of the land in question as the Corporation was not in a position to hand over the vacant possession as stipulated. Clause 7(iii) & Clause 7(iv) had to be read conjointly and the case put-up by the petitioner that the Corporation ought not to have varied the terms of the contract should be appreciated in light of the situation in which the Corporation found itself due to various litigations. In relation to the contention regarding rate of interest and the point of time as to when the interest should start running it was submitted on behalf of the Corporation that the said contention had to be appreciated in light of the fact that it was the wisdom of the Standing Committee on the basis of which the said decision had been arrived at and the Court ought not to go behind the same. That, even otherwise the interest charged by the Corporation to the tax payers was a statutory rate, while the rate of 14% at the time of granting instalments to the respondent No.3 was worked out on the basis that if the Corporation was to borrow the amount from any

financial institution, the Corporation was required to pay interest @ 12% plus administrative and incidental expenses of 0.75% resulting in total burden of 12.75%. That, instead of the same the Corporation had charged interest @ 14%. That, the Corporation was able to hand over vacant possession of the land only on 15/12/2000 and hence, it was thought fit to charge interest on and from 16/12/2000, on the instalments which fell due thereafter. In the circumstances, even on facts the decision of the Corporation was based on sound commercial principles and should not be interfered with.

6. The learned Counsel for the respondent No.3 submitted that the respondent No.3 had abided by the terms of the original contract, but as the Corporation was not able to fulfill its part of the contract, the respondent No.3 was constrained to seek modification of the terms considering that the respondent No.3 had already deposited a sum of Rs.86,71,62,500/with the Corporation without being put in possession of the land in question. That, it had already constructed transport godowns on the alternate site as per the terms of the original agreement and despite having handed over possession of the same to the Corporation, due to various litigations the Corporation was facing, it was not in a position to hand over the vacant possession. That, in the circumstances, the respondent No.3 had approached the Corporation with an offer as detailed in letter dated 15/5/2000 seeking part possession of the land in question on the basis of the payment already made. That in the circumstances, the action of the Corporation in entering into a modified contract on 29/12/2000 on the basis of resolution dated 19/12/2000 was the culmination of various proposals and counter proposals as contained in correspondence between respondent No.3 and the Corporation.

7. In rejoinder, learned Counsel for the petitioner submitted that the petitioner was not challenging the contract entered into between the Corporation and the respondent No.3 but was, in fact, seeking a direction to the Corporation and the respondent No.3 to act in accordance with the terms of the original contract and the subsequent action of the modification of the terms by way of entering into a fresh contract on 29.12.2000 was under challenge. It was submitted that as observed by the Apex Court in the case of Sterling Computers Limited Vs. M/s. M & N Publications Limited and others, (1993) 1 SCC 445, philanthropy is no part of the management of an undertaking while dealing with a contractor entrusted with the execution of a contract.

8 As can be seen from the facts which have come on record, the original contract as modified by the agreement dated 29/12/2000 entered into by the Corporation with the respondent No.3, has already been acted upon by both the parties and stands exhausted. Therefore, in this petition, the only question that would survive is as to whether the Corporation was justified in handing over part possession of the land in question to the respondent no.3 even before the entire premium was paid by the respondent No.3, and incidentally whether it was open to modify the terms of the original contract by granting instalments for payment of the remainder premium bearing interest @ 14%, and from what date such interest should start running. As per the terms of the original agreement clause 7(i) stipulates that amount equivalent to 25% of the premium shall be paid within thirty days of communication by the Commissioner of acceptance of the offer made by the tenderer and thereafter the respondent No.3 was entitled to submit building plans for securing development permission. Admitedly, the said condition had been fulfilled by the respondent no.3. Clause 7(ii) of the original agreement stipulates that the respondent no.3 was to pay the remaining premium amount against handing over of the possession of the land in question and the earnest money deposited was to be adjusted at the time of final payment. Clause 7(iii) provides that the Corporation will hand over the vacant possession of the land in question within two months from the date of handing over the possession of the alternate godowns to be constructed by the respondent no.3 as specified in condition no.II-C of the tender agreement. It is further provided in the said clause that in case the corporation hands over the possession of the land in question prior to the aforesaid specified time limit the Corporation shall intimate the probable date of handing over the date of possession at least fifteen days in advance. However, in computing any of the periods referred to in the said clause, the period during which any action or proceedings are stayed by an order of a Court shall be excluded. Clause 7(iv) provides that no permission for entering the land in question will be granted before full payment of premium. Sub-clause (v) stipulates that if any of the payment as stipulated is not paid on or before the specified time on which the said payment falls due, the amount paid by the tenderers shall stand automatically forfeited on the expiry of the said due date and the tenderer shall have no claim whatsoever to the right to enter into and/or develop the land in question. Clause 7(vi) provides that the lease agreement shall be made only on receipt of full payment of premium.

9 Therefore, on reading the tender agreement as a whole it is apparent that once the Corporation had communicated the acceptance of the offer, the respondent no.3 was required to pay the amount equivalent to 25% of the premium within a period of thirty days, which was admittedly done. Only after the entire premium amount was paid, the land in question was to be handed over by the Corporation to respondent No.3. But sub-clause (iii) specifically stipulated that the construction of godowns at the alternate site was a prerequisite condition and upon fulfillment of the said condition by the respondent no.3, the Corporation was required to handover the possession of the land in question. Thus, the construction of the godowns at the alternate site and handing over possession of the land in question were interlinked just as the entire payment of premium was also interlinked with the handing over of the possession of the land in question. Reliance on clause 7(v) of the contract on behalf of the petitioner to contend that it was open to the Corporation to forfeit the entire amount if the payment of the entire remaining premium had not been made without putting the respondent no.3 in possession has to be appreciated in light of the fact that 25% of the premium was to be paid within 30 days of the communication of the offer as laid down in sub-clause (i) of clause 7, but the payment of the remaining premium amount was to be made against handing over the possession of the land in question (Clause 7[ii]). Therefore, reference to specified time or the expiry of the due date in sub-clause (v) of clause 7 can have reference only to the payment envisaged in clause 7(i) of the agreement. For the purpose of payment of the remaining premium amount the due date would be the date of handing over the possession of the land in question as envisaged under clause 7(ii) of the contract. Therefore, till the Corporation did not hand over the possession of the land in question there was no occasion for the respondent no.3 to make payment of the remaining premium amount. However, as the facts go to show, nearly 61% of the total contracted amount had been paid by the respondent no.3 and the Corporation had already been put in possession of newly constructed godowns at the alternate site and yet the Corporation was not in a position to hand over the vacant possession of the land in question within two months as required under the original terms of contract. In these circumstances, it was but natural for the respondent no.3 as a prudent businessman, to seek variation in the terms of the contract, because on the one hand its funds were blocked and on the other the Corporation was not in a position to give the vacant

possession of the land in question due to the ongoing litigation. In the circumstances, it is not possible to state that the Corporation acted arbitrarily or without justification in modifying the terms of the original contract which appears to have been done due to circumstances beyond the control of the Corporation.

10 The respondent No.1 Corporation has tendered an additional affidavit dated 28/11/2003 for placing on record the factual details as regards the date on which the entire payment was received by the Corporation and the date on which the total possession of the land was given to the respondent no.3. In the earlier affidavit dated 17/1/2001 it was stated by the Corporation that against the payment of Rs.111 crores, inclusive of earnest money deposited, which amounted to 61% of the total tender amount, the Corporation had handed over approximately 38% of the land in question. In the additional affidavit this aspect has been amplified to state that on 17/7/2000 the respondent no.3 was given possession of 14,114 sq.mtrs. of the land in question for the purpose of development against total payment of Rs.1,11,71,62,500/- i.e. 61% of the total premium amount including earnest money deposit. This was done, as could be seen from the correspondence entered into between the Corporation and the respondent no.3, in light of the fact that the Corporation was not in a position to hand over the possession of the entire land in question by 15/12/2000 as per terms of the original contract. It is not necessary to reiterate various reasons, which have been elaborately spelt out in the reply affidavit of the Corporation, which prevented the Corporation from handing over the vacant possession of the land in question. Suffice it to state that the Corporation was embroiled in litigations before different forums in relation to the land in question. It is further stated in the additional affidavit that as per modified agreement dated 29.12.2000 the respondent no.3 made payment of the last and final instalment of the total premium amount on 31/12/2001 and it was only thereafter, in the month of April 2002, that possession of the remaining land in question viz. 21,352.07 sq.mtrs. came to be given to respondent no.3. Therefore, the contention that the respondent no.3 was handed over the possession of the land in question even before the entire premium had been paid cannot be accepted, because only a part of the possession of the land could be given in the changed circumstances in which the Corporation was put and as a consequence forced to vary the terms of the original agreement. However, the remainder portion of the land in question was not parted with by the Corporation till the entire payment of

premium was paid-up. Therefore, even as per the modified term stipulated in agreement dated 29.12.2000 the Corporation was not required to hand over the entire land in question and it was only part of the land which was handed over in light of the peculiar situation in which the Corporation was put.

11 The legal position is well settled that in relation to a decision taken by a public authority in commercial/contractual transactions only the decision making process is open to judicial review and the Court is not empowered to substitute its own decision once the Court finds that there was no illegality or irrationality or procedural impropriety while arriving at the decision. It is also equally well settled that the duty of the Court is to confine itself to the question of legality. Its concern should be :

" 1. whether a decision-making authority exceeded its powers ?

2. committed an error of law;

3. committed a breach of the rules of natural justice;

4. reached a decision which no reasonable Tribunal would have reached; or

5. abused its powers".

The present is not a case where it could be stated that the decision making process is vitiated in light of the well settled principles.

12. In relation to the submission regarding the rate of interest and the period from which the interest should start running the explanation tendered on behalf of the respondent corporation is acceptable and the Court is not required to interfere with the same merely because a different rate of interest might appear to be better or more scientific or more logical. Even otherwise, as stated hereinbefore, the respondent Corporation has placed before the Court the basis on which the rate of interest was fixed and the date from which such interest should be charged and there is no valid reason to infer that any undue favour was shown by the Corporation to the respondent No.3 in charging interest.

13 In the result, the petition is liable to be rejected in as much as there is absolutely no ground made out for holding that the action of the respondent

Corporation was contrary to public interest, arbitrary or malafide. The petition is therefore rejected. Notice is discharged. There shall be no order as to costs.

(R.K.Abichandani, J)

(D.A.Mehta, J)

m.m.bhatt